

United States Court of Appeals for the Federal Circuit Appellate Mediation Pilot Program Guidelines

A. Introduction

The United States Court of Appeals for the Federal Circuit is establishing a voluntary appellate mediation pilot program. The program is established pursuant to Federal Rule of Appellate Procedure 33. The chief judge has appointed a three-judge committee to oversee and monitor the pilot program. The pilot program will be administered by the Circuit Mediation Officer, who is a member of the Office of the Clerk and Circuit Executive. The pilot program will be periodically assessed by the court and it may be extended, modified, discontinued, or made permanent.

The purpose of the program is to help the parties achieve settlement. The mediation program will provide a confidential, risk-free opportunity for parties to resolve their dispute with the help of an experienced neutral, third-party mediator. Mediation, unlike arbitration where a decision that may be binding is issued, will result in a settlement only if all parties agree on that resolution.

B. Eligible Cases

With the exception of certain categories of cases, i.e., pro se cases, mandamus petitions, ex parte appeals from the Patent and Trademark Office, antidumping and countervailing duty cases, International Trade Commission cases, TECA-legacy cases, and petitions for review of the Secretary of Veterans Affairs' rulemaking, all cases where the parties are represented by counsel are eligible for the pilot program.

C. Case Selection Process

Participation in the court's mediation program is voluntary. However, counsel are expected to be receptive to exploring mediation. The Circuit Mediation Officer will contact principal counsel in selected cases to determine whether the case is a good candidate for mediation and whether counsel agree to participate. At that time, the Circuit Mediation Officer will ask counsel to determine whether the appeal and, if pertinent, the cross-appeal, present any jurisdictional defects. If at the outset it appears to the Circuit Mediation Officer that mediation would not be fruitful, then court mediation efforts will cease. If all parties agree that mediation would be useful, then the Circuit Mediation Officer will select and refer the case to an outside mediator. In addition, counsel may confidentially jointly request that a case be included in the mediation program. A Confidential Joint Request to Enter Mediation Program form is available from the clerk's office and on the court's web site. Such a request will not appear on the court's docket sheet, and will be directed to the Circuit Mediation Officer.

The Circuit Mediation Officer may review the notice of appeal, the trial tribunal's docket sheet, the decision of the trial tribunal, the court's docketing statement, and briefs to aid in selecting cases for mediation. The docketing statement is a new two-page form to be completed

by counsel. The form will be included in the docketing packet sent to counsel by the clerk's office. All counsel must complete the form in duplicate and return it to the clerk's office within 14 days of docketing. The docketing statement is not part of the formal mediation process, but will assist the Circuit Mediation Officer with the selection process. One copy will be retained in the clerk's office case file and the other copy will be transmitted to the Circuit Mediation Officer.

D. Outside Mediators

The Federal Circuit Bar Association will be asked to provide the court with a list of distinguished, experienced attorneys and academicians with expertise in the substantive areas of the court's jurisdiction, as well as attorneys with experience mediating. The candidates are encouraged to be members of the bar of the court, but are not required to be members. The court will select a roster of mediators from the list. The goal is to have a roster of mediators who will have expertise in a cross section of the court's jurisdiction.

The selected mediators must not be in active practice and must be from the District of Columbia metropolitan area. Mediators will not be paid for their services, but will be reimbursed by the court for minor out-of-pocket expenses, such as photocopying costs, telephone charges, facsimile charges, and transportation to the courthouse. Mediation proceedings may be held in the courthouse if desired.

The Circuit Mediation Officer must select a mediator from the court's list with the following exception. If counsel jointly propose a mediator not on the list, then the Circuit Mediation Officer will have the option of appointing that mediator, provided the parties agree to pay any out-of-pocket expenses of the mediator and the mediator agrees to serve pro bono.

Before final selection of a mediator, the Circuit Mediation Officer will inquire about conflicts of interest. The mediator must not presently represent either party for any purpose, must disclose any past relationships with counsel, counsels' firms, and the parties, and must disclose any potential "issues" conflicts. Mediators are required to decline from participating in any cases in which there is a conflict of interest, in which they perceive a conflict, or in which a reasonable person would perceive a conflict.

Mediators are obligated to protect the confidentiality of all proceedings and not communicate with any court officials except the Circuit Mediation Officer about what transpires in a mediation session. All communication with the court about mediation matters will be between the mediator and the Circuit Mediation Officer.

E. Confidentiality

Confidentiality is ensured throughout the mediation process except as noted in this document. The Circuit Mediation Officer will not communicate with the judges about the substance of mediation proceedings. During the pilot program, however, the committee appointed by the chief judge will from time to time have discussions with the Circuit Mediation Officer with a view to revising the pilot program while it is ongoing, as appropriate and

necessary. Communications concerning statistical information and information needed to assess the program are not prohibited. Papers generated by the mediation process will not be included in the clerk's office files except as noted in connection with motions for extensions of time. Outside mediators will protect the confidentiality of all proceedings and are prohibited from complying with subpoenas or other requests for information about mediated cases. The court expects participating counsel to refrain from commenting publicly about the fact that a case is or was in mediation or from disclosing any information about the mediation to anyone who is or was not directly or indirectly a party to the proceedings. That said, if all counsel and all the parties agree in writing to public disclosure, and the mediator consents, disclosure is not prohibited. Even with such consent, counsel should not include mention of mediation in their briefs or at oral argument.

The above is not intended to guarantee absolute secrecy about the identity of cases selected for mediation. Nor is it meant to preclude dissemination of information about the types or categories of cases going through the mediation process and about overall program results.

F. Mediation Process

Mediation is a flexible process. The mediator is not bound by a defined formula or approach to mediating a case and the mediator will conduct the mediation as he or she deems appropriate. Mediation will cease at any time the outside mediator concludes that further efforts will not be fruitful.

The purpose of mediation is a settlement of the case. At least for purposes of this pilot program, the mediator will not be asked to narrow the issues on appeal. To the extent that the parties agree to narrow the issues, that will be reflected in their briefs.

The court requires that counsel attend all sessions and that, at least one time during the process, counsel and the parties (or someone with actual settlement authority) meet face to face. If the United States government is one of the parties, the mediator may waive this requirement by allowing a senior government attorney without authority to settle to attend if someone with settlement authority can be reached by telephone during the mediation session. If government settlement decisions must be made collectively, then a senior attorney who is authorized to negotiate on behalf of the government and make recommendations concerning settlement must be present. When settlement authority rests with an official at the rank of Assistant Attorney General, its equivalent, or higher, then the requirement that the official be reachable during the mediation session may be waived.

G. Briefing and Oral Argument Schedule Extensions

It is contemplated that after a case is referred to a mediator, mediation should be completed in 90 days. At the outside, mediation must be completed within 150 days of the date of reference. At the outset, cases generally will be selected before the first brief is filed. The program may later be extended to cases in which briefs have been filed. While cases in mediation remain subject to the normal scheduling for briefs and oral argument by the clerk's office, counsel are of course free to file a consent motion for an extension of time pursuant to

Fed. Cir. R. 27(h)(4) in the ordinary course by mentioning settlement, but not mediation. If the mediator and the parties believe that multiple mediation sessions are required, that the filing of a brief or the scheduling of oral argument would interfere with good faith settlement efforts, and that additional extensions of time are needed, then a joint motion for additional extensions may be filed. A motion for an extension, beyond the time granted under Rule 27(h)(4), will be referred to the Circuit Mediation Officer. The court has given the Circuit Mediation Officer the authority to grant motions for extensions, upon the showing of good cause, up to a date that is no more than 150 days after the case was referred to the mediator.

In order to maintain the confidentiality of the mediation process, a joint motion for an extension of time for mediation purposes (beyond a Rule 27(h)(4) motion) must be filed in a public version and a version stamped “Direct to Circuit Mediation Officer.” The public version should move for an extension of time on the basis of settlement discussions without reference to mediation. The public version will be placed in the public file and entered on the docket sheet in the usual course. The Circuit Mediation Officer’s version must state that the parties are in mediation, must state that the mediator agrees with the need for an extension, and must include reasons for the extension. The Circuit Mediation Officer will rule on the motion under the name of the clerk. The ruling will be entered on the docket sheet in the clerk’s office.

H. The Conclusion of Mediation

The purpose of the mediation program is to help the parties achieve settlement. If settlement is reached, then the agreement must be in writing and binding on all parties. The appellant or the parties jointly must file a motion or stipulation of voluntary dismissal or other appropriate motion. If the case is not settled, then it will remain on the docket and proceed as if mediation had not been initiated.

I. Noncompliance Sanctions

Any party, counsel or mediator who fails to materially comply with any of the provisions of this document may be subject to appropriate sanction by the court.

J. Evaluation

During the pilot program, the Committee and the Circuit Mediation Officer will have ongoing discussions about the course of mediation efforts with the view of revising the program as necessary and appropriate.

At the conclusion of the mediation process in an individual case, the mediator will notify the Circuit Mediation Officer of the resolution of the mediation. The Circuit Mediation Officer will send a questionnaire to counsel and the mediator inviting their candid confidential responses, which will not be provided to the judges or others, about the effectiveness of the pilot program. The questionnaire responses will be summarized by the Circuit Mediation Officer – without identification of any specific case – for purposes of evaluating the program, compiling statistics, etc. The summary will be provided to the court for purposes of assessing the pilot program, but it will not reveal any details about or names of specific cases.